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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1262

ALBERT G. AVERY,

Petitioner,

vs.

ROBERT W. OWENS, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondent does not agree with the petitioner's statement of the "Questions Presented" (brief p. 2) or his "Statement of the Case" (brief pp. 3-8), both of which are, in the opinion of the respondent, inaccurate, incomplete and misleading, and assert as facts matters that are merely the petitioner's contentions.

The Question Presented

The only question presented is:

> Whether the determination of the Special Referee in a proceeding in the Supreme Court of the State of New York, New York County, brought by Katharine A. Feuerlicht and Emile B. Bender, as trustees, against the petitioner herein under Article 79 of the New York

Civil Practice Act (*Matter of Feuerlicht* v. *Avery*, New York Law Journal, December 7, 1964, aff'd 24 A D 2d 555), was dispositive of the issues in the within libel action?

The Special Term of the New York Supreme Court held that it was not dispositive and that triable issues were presented (Appendix p. 2a). The Appellate Division of the New York Supreme Court, First Department, unanimously affirmed without opinion (25 A D 2d 498). The New York Court of Appeals denied the petitioner's application for leave to appeal (N.Y.L.J. April 27, 1966).

Statement of the Case

The respondent is an attorney and counselor-at-law of the State of New York, and is now, and has been for more than forty years last past, engaged in active practice in New York City. The petitioner is one of the remaindermen of a trust established by his father and mother, Brainard and Josephine G. Avery.

The said trust was created on September 12, 1921 in the City and State of New York by Brainard and Josephine G. Avery who at the time were residents of New York. The corpus of the trust consisted of personal property then situated in New York. The term of the trust was for the joint lives of Brainard and Josephine and the survivor. It was amended on April 23, 1937 (Fourth Amendment) so as to provide that upon the death of Brainard the income should be paid to Josephine and to Emilie B. Bender in specified proportions, and that upon the death of Josephine the principal should be distributed one-third to the petitioner, one-third to his sister Katharine (now Katharine A. Feuerlicht) and one-third to Miss Bender. The validity of this amendment was sustained by the Vermont Supreme Court in 1954 (*Avery* v. *Bender*, 119 Vt. 313).

By amendment made on November 28, 1939 (Sixth Amendment), the settlors appointed Katharine and Miss Bender as trustees upon the death of Josephine. In or about 1941, the settlors moved to Vermont and later removed the trust securities to that state.

Josephine survived Brainard and died on December 7, 1962.

After the death of Josephine, Mrs. Feuerlicht and Miss Bender, then residents of the State of New York, duly qualified as trustees, removed the trust assets to New York, and commenced their distribution to the plaintiff, to Mrs. Feuerlicht and to Miss Bender in equal shares, in accordance with the terms of the trust.

The petitioner, dissatisfied with the provisions of the trust, and claiming and representing to transfer agents and others that Mrs. Feuerlicht and Miss Bender were not trustees and that Miss Bender, by a paper dated November 29, 1939, had relinquished all interest in the principal and income of the trust (erroneously, as was held in *Matter of Feuerlicht* v. *Avery,* 19 A D 2d 862), and that the removal of the trust assets from Vermont to New York was unlawful, attempted, by means of such claims and representations to interfere with the trustees' administration of the trust and to prevent them from distributing any part of the assets to Miss Bender.

Seven of the letters so written by the petitioner contained the libelous material sued upon in the within action.

Petitioner's motion to dismiss the complaint for insufficiency was previously denied (*Owens* v. *Avery,* 23 A D 2d 722). The case is now at issue but has not yet been tried.

The judgment which the petitioner claims gave rise to a so-called "collateral estoppel", was entered in the aforesaid proceeding of *Matter of Feuerlicht* v. *Avery,* 19 A D

2d 862. The respondent was one of the attorneys for the trustees in said proceeding, but was not a party to said proceeding, or in privity with any party.

The judgment entered therein determined, adversely to the claims of the petitioner, that Mrs. Feuerlicht and Miss Bender were trustees of the said trust, and that Miss Bender had not released her interest in the trust. The judgment nowhere contained the supposed adjudication on which the petitioner relies for his claim of "collateral estoppel". Such claim is based upon a dictum of the Special Referee in which he said:

> "With respect to the injunctive relief herein sought, there is no doubt that the record herein supports a finding that respondent has interfered with the administration of the trust. However, this proceeding has been brought pursuant to Article 79 of the CPA (now article 77 of the CPLR), the purpose of which is to provide an expeditious special proceeding rather than an action for disputes arising out of trust accountings, construction and related trust matters (See Ninth Annual Report of the Judicial Council (1943) p. 305, et seq.). Injunctive relief and other drastic remedies do not appear to have been contemplated by this simplified procedure. The fact that determinative references of the issues in a proceeding relating to an express trust are permitted does not give a referee the authority to determine issues which are only collaterally related to the trust issues and which are more properly the subject of actions. Such authority will not be presumed in this proceeding.
>
> Moreover, even if authority to grant injunctive relief were present in this proceeding, the advisability of such relief at this time would be questionable. Respondent heretofore had acted under some color of right to protect a fund in which he had an interest from what he believed to be improper administration and wrongful distribution. He is a member of the bar

of this state. At this juncture there is no reason to contemplate that he will ignore or in any way be contumacious of the ultimate mandate of the courts of this state."

Conclusion

It is respectfully submitted that the petition for a writ of certiorari to the Appellate Division of the New York Supreme Court, First Judicial Department, should be denied because: (1) The order sought to be reviewed did not finally determine the within action; (2) the judgment relied upon by the petitioner for his claim of collateral estoppel did not contain the adjudication that the petitioner attributes to it; (3) no constitutional or federal question is involved; (4) no novel or important issues of law are involved; (5) *New York Times* v. *Sullivan*, 376 U. S. 254, and subsequent cases have no application to the respondent, who was not a public official and was not engaged in a discussion of public issues; and (6) the order sought to be reviewed was correct and proper.

Dated: April 28, 1966.

Respectfully submitted,

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